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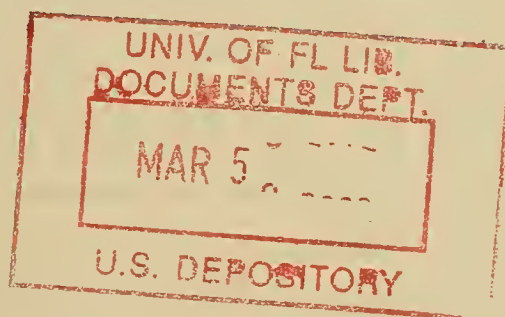
(INTERPRETATIVE BULLETIN)

**General Statement as to the Effect of the
Portal-to-Portal Act of 1947
on the
Fair Labor Standards Act of 1938**

Title 29, Chapter V, Code of Federal Regulations

Part 790

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**UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
OFFICE OF THE ADMINISTRATOR**

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UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

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GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938*

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GENERAL

SECTION 790.1. INTRODUCTORY STATEMENT

(a) The Portal-to-Portal Act of 1947 was approved May 14, 1947.¹ It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,² the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these acts.

(b) It is the purpose of this bulletin to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this bulletin, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length herein,³ because the primary purpose of this bulletin is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this bulletin is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would

¹ An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes. Public Law No. 49, 80th Cong., ch. 52, 1st sess.

For the sake of brevity, this act is referred to in the following discussion as the Portal Act.

² 52 Stat. 1060; 29 U. S. C. 201 et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this act, see footnote 17.

³ Secs. 790.23 through 790.29 of this bulletin discuss briefly those provisions of the Portal Act which affect the operation or enforcement of the Fair Labor Standards Act only with respect to activities engaged in by employees before May 14, 1947. Since the so-called "good-faith defense" against past claims is considered incidentally in the discussion of the similar provisions for the future, no separate discussion of this provision is included in these sections.

seem desirable also that he make these conclusions known to persons affected by the law.⁴ Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administrator believes to be correct⁵ and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.⁶ As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained herein.

SECTION 790.2. INTERRELATIONSHIP OF THE TWO ACTS

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interrelated parts of the entire statutory scheme for the establishment of basic fair labor standards.⁷ The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.⁸ But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.⁹ The Congressional declaration of policy

⁴ See *Skidmore v. Swift & Co.*, 323 U. S. 134; *Kirschbaum Co. v. Walling*, 316 U. S. 517; Portal-to-Portal Act, sec. 10.

⁵ The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

⁶ *Skidmore v. Swift & Co.*, 323 U. S. 134. See also *Roland Electrical Co. v. Walling*, 326 U. S. 657; *United States v. American Trucking Assn.*, 310 U. S. 534; *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572.

⁷ As appears more fully in the following sections of this bulletin, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provisions of the Fair Labor Standards Act. Sec. 13 of the Portal Act provides that the terms "employer," "employee," and "wage," when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter act.

⁸ Portal Act, secs. 1, 2, 4, 6, 9, 10, 11, 12.

Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch, and Ferguson, 1947 Cong. Rec. 2168; colloquy between Senators Donnell and Ferguson, 1947 Cong. Rec. 2198; statement of Representative Gwynne, 1947 Cong. Rec. 1614.

⁹ See references to this policy at p. 5 of the Senate Committee Report on the bill (S. Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 1947 Cong. Rec. 2251; see also statement of Senator Morse, 1947 Cong. Rec. 2349; statement of Representative Walter, 1947 Cong. Rec. 4514.

in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.¹⁰ Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act,"¹¹ that it "protects the legitimate claims" under that act,¹² and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act."¹³ It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation¹⁴ and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within [the] terms and spirit" of such an exemption.¹⁵

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 act. The provisions of the Portal Act do not *directly* affect the provisions of section 15 (a) (1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the act's requirements, or the provisions of section 11 (c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in *any* way the provision in section 15 (a) (3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12 (a) of the act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered herein in connection with the discussion of specific provisions of the 1947 act.

¹⁰ Cf. H. Rept. No. 71; S. Rept. No. 48; H. (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 1947 Cong. Rec. 4516; statement of Senator Wiley, 1947 Cong. Rec. 4398; statement of Representative Gwynne, 1947 Cong. Rec. 1629; statements of Senator Donnell, 1947 Cong. Rec. 2204-2206, 2251-2252; statement of Representative Robsion, 1947 Cong. Rec. 1553; Message of the President to Congress, May 14, 1947, on approval of the act.

¹¹ Statements of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 and 4501. See also statement of Senator Cooper, 1947 Cong. Rec. 2373; statement of Representative Robsion, 1947 Cong. Rec. 1553.

¹² Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4516. See also statement of Representative Keating, 1947 Cong. Rec. 1566.

¹³ Statement of Senator Cooper, 1947 Cong. Rec. 2378. See also statements of Senator Donnell, 1947 Cong. Rec. 2439, 2440, 2442; statements of Representatives Walter and Robsion, 1947 Cong. Rec. 1550, 1552.

¹⁴ *Roland Electrical Co. v. Walling*, 326 U. S. 657; *United States v. Rosenwasser*, 323 U. S. 360; *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697.

¹⁵ See *A. H. Phillips Co. v. Walling*, 324 U. S. 490; *Walling v. General Industries Co.*, 330 U. S. 545.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

SECTION 790.3. PROVISIONS OF THE STATUTE

Section 4 of the Portal Act, which relates to so-called "portal-to-portal" activities engaged in by employees *on or after* May 14, 1947, provides as follows:

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum-wage and overtime-compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

SECTION 790.4. LIABILITY OF EMPLOYER; EFFECT OF CONTRACT, CUSTOM, OR PRACTICE

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1947, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.¹⁶ Where, in these cir-

¹⁶ The Fair Labor Standards Act requires payment of a minimum wage of not less than 40 cents an hour for all hours worked (except to certain learners, apprentices, handicapped workers, and messengers, and in certain industries in Puerto Rico and the Virgin Islands), and overtime compensation for all hours worked in excess of 40 in a workweek at a rate not less than one and one-half times the employee's regular rate of pay.

cumstances, such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.¹⁷ The primary congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history, were (1) to minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria¹⁸ for determining compensable worktime, independently of contract, custom, or practice;¹⁹ and (2) to leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.²⁰

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; *and*

(2) They take place before or after the performance of all the employee's "principal activities" in the workday; *and*

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have *not* been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are per-

¹⁷ The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation, together with an additional equal amount (subject to sec. 11 of the Portal-to-Portal Act, discussed below in sec. 790.22) as liquidated damages (sec. 16 (b) of the act); and, if his act or omission is willful, subjects him to criminal penalties (sec. 16 (a) of the act). Civil actions for injunction can be brought by the Administrator (secs. 11 (a) and 17 of the act).

¹⁸ Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in "physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (*Tennessee Coal, Iron & R. R. Co. v. Muscoda Local*, 321 U. S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (*Armour & Co. v. Wantock*, 323 U. S. 126, 132-134; *Skidmore v. Swift & Co.*, 323 U. S. 134, 136-137).

¹⁹ Portal Act, sec. 1; Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 1947 Cong. Rec. 4154, 4398; statements of Senator Donnell, 1947 Cong. Rec. 2159, 2192, 2193, 2255, 2256, 2440, 2441; statements of Senator Cooper, 1947 Cong. Rec. 2370-2377.

²⁰ Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374, 2375, 2376-2377, 2378; statement of Representative Gwynne, 1947 Cong. Rec. 4513; Statements of Senator Wiley, 1947 Cong. Rec. 2154, 4398.

formed. The statute states that "the employer shall not be so relieved" if such activities *are* so compensable;²¹ it does not matter in such a situation that they are so-called portal-to-portal activities.²² Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations:

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;²³ *or*

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.²⁴

In applying these principles, it should be kept in mind that under the provisions of section 4 (c) of the Portal-to-Portal Act, "preliminary" or "postliminary" activities which take place outside the workday "before the morning whistle" or "after the evening whistle" are, for purposes of the statute, not to be considered compensable by a contract, custom, or practice if such contract, custom, or practice makes them compensable only during some other portion of the day.²⁵

SECTION 790.5. EFFECT OF PORTAL-TO-PORTAL ACT ON DETERMINATION OF HOURS WORKED

(a) In the application of the minimum-wage and overtime-compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4 (d). This section requires that—

in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described [in sec. 4 (a)] there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable [under contract, custom, or practice within the meaning of sec. 4 (b), (c)].²⁶

This provision is thus limited to the determination of whether time spent in such "*preliminary*" or "*postliminary*" activities, performed *before or after the employee's "principal activities"* for the workday²⁷ must be included or excluded in computing time worked.²⁸ If time spent in *such* an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,²⁹

²¹ Sec. 4 (b) of the act (quoted in sec. 790.3, above).

²² Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2255-2256; colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2376. Cf. colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

²³ Statements of Senator Donnell, 1947 Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376.

²⁴ Statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256.

²⁵ Conference Report, pp. 12, 13. See also sec. 790.12, below.

²⁶ The full text of sec. 4 of the act is set forth in sec. 790.3 of this bulletin.

²⁷ See *infra*, sec. 790.6.

Sec. 4 (d) makes plain that subsecs. (b) and (c) of sec. 4 likewise apply only to such activities.

²⁸ Conference Report, p. 13.

²⁹ See footnote 18.

then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing time worked, if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.³⁰ Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.³¹ But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4 (d) of the Portal Act.

(b) The operation of section 4 (d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect, of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.³² But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4 (c) of the Portal Act,³³ if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

SECTION 790.6. PERIODS WITHIN THE "WORKDAY" UNAFFECTED

(a) Section 4 of the Portal Act *does not affect the computation of hours worked within the "workday" proper*—roughly described as the period "from whistle to whistle"—and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.³⁴ Under

³⁰ See Conference Report, pp. 10, 13.

³¹ Conference Report, p. 10.

³² Cf. colloquies between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253, 2255, 2256; colloquy between Senators Ellender and Cooper, 1947 Cong. Rec. 2374; colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2376. See also S. Rept., p. 48.

³³ See secs. 790.3 and 790.12 of this bulletin; Conference Report, pp. 12, 13. See also Senate Report, p. 48.

³⁴ The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (sec. 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they "occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur *after the employee commences* to perform the first principal activity on a particular workday and *before he ceases* the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.³⁵ The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,³⁶ which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.³⁷

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday," and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.³⁸ If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation, the time spent waiting for work would be part of the workday,³⁹ and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

³⁵ See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398 (also 2154, 2155); Statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513; statements of Senator Cooper, 1947 Cong. Rec. 2371, 2374-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255, 2256, 2440.

³⁶ See, in this connection, statements of Senator Cooper, 1947 Cong. Rec. 2373-2374, 2376-2377; statements of Senator Donnell, 1947 Cong. Rec. 2255-2256, 2440; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also footnote 18, *supra*.

The determination of hours worked under the Fair Labor Standards Act is the subject of a separate interpretative bulletin, No. 13, which will be republished in revised form as Part 785 of Title 29, Chapter V, Code of Federal Regulations.

³⁷ See statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398. See also the discussion below in secs. 790.7 and 790.8 of this bulletin.

³⁸ Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statements of Senator Donnell, 1947 Cong. Rec. 2440; statements of Senator Cooper, 1947 Cong. Rec. 2375-76.

³⁹ Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375, 2376.

SECTION 790.7. "PRELIMINARY" AND "POSTLIMINARY" ACTIVITIES

(a) Since section 4 of the Portal Act applies only to situations where employees engaged in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation, will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.⁴⁰ On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday proper.⁴¹ And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" activity, section 4 (d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act if it would not be so counted under the latter act alone.⁴²

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" mean an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the act:

Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which [the] employee is employed to perform.⁴³

(c) The statutory language and the legislative history indicate that the "walking, riding, or traveling" to which section 4 (a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working

⁴⁰ See Conference Report, pp. 10, 12, 13; statements of Senator Donnell, 1947 Cong. Rec. 2253, 2255, 2256; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2376. See also secs. 790.4 and 790.5 above.

⁴¹ See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4513. See also sec. 790.6 above.

⁴² See sec. 790.5 (a) of this bulletin.

⁴³ Portal Act, subsecs. 4 (a), 4 (d). See also Conference Report, p. 13; statement of Senator Donnell, 1947 Cong. Rec. 2255, 2440.

hours.⁴⁴ For example, travel by a repair man from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding, or traveling" described in section 4 (a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4 (a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.⁴⁵ In situations such as these, where an employee's travel is not of the kind to which section 4 (a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.⁴⁶

(d) An employee who walks, rides, or otherwise travels while performing active duties is not engaged in the activities described in section 4 (a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.⁴⁷

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the *actual place of performance* of the principal activity or activities *within the employer's plant, mine, building, or other place of employment*, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." [Italics added.] The phrase, "actual place of performance," as used in section 4 (a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of his principal activity or activi-

⁴⁴ These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which [the] employee is employed to perform," which follows the term "walking, riding, or traveling" in sec. 4 (a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection, the statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2256, 2441; statement of Senator Cooper, 1947 Cong. Rec. 2374. See also Senate Report, pp. 47, 48.

⁴⁵ The Report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language the many thousands of situations that do not readily fall within the pattern of the ordinary workday."

⁴⁶ These principles will be discussed in Part 785 of Title 29, Chapter V, of the Code of Federal Regulations, which will replace Interpretative bulletin No. 13.

⁴⁷ Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities *which are not an integral part of the employment for which the worker is employed.*" [Italics supplied.] 1947 Cong. Rec. 2377.

ties, and the return travel from that place at the end of the workday. However, where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "troubleshooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has no significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench, or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.⁴⁸

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.⁴⁹

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.⁵⁰ This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.⁵¹ The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.⁵²

SECTION 790.8. "PRINCIPAL" ACTIVITIES

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into

⁴⁸ See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2192, 2255, 2441.

⁴⁹ See Senate Report, p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375. See also par. (h) of this section and sec. 790.8 (c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which sec. 4 (a) refers.

⁵⁰ See par. (b) of this section. See also footnote 49, above.

⁵¹ Colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375-6.

⁵² See *Skidmore v. Swift & Co.*, 323 U. S. 134, 7 WHR 1165.

account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.⁵³ But before it can be determined whether an activity is "preliminary or postliminary to [the] principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.⁵⁴ The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;⁵⁵ rather, an employee may, for purposes of the Portal-to-Portal Act, be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";⁵⁶ they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act.⁵⁷ Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities,'" and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."⁵⁸ The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.⁵⁹ A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."⁶⁰

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.⁶¹ Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal bill.⁶² They are the following:

⁵³ See secs. 790.4 through 790.6 of this bulletin; also, part 785 of title 29, ch. V, of the Code of Federal Regulations, which will replace Interpretative Bulletin No. 13 as a statement of the principles for determining hours worked under the Fair Labor Standards Act.

⁵⁴ Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see sec. 790.7 (b) of this bulletin), they are described with reference to the place where *principal* activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

⁵⁵ Cf. *Edward P. Allison Co., Inc. v. Commissioner of Internal Revenue*, 63 F. (2d) 553 (C. C. A. 8, 1933).

⁵⁶ Cf. *Armour & Co. v. Wantock*, 323 U. S. 126, 132-134; *Skidmore v. Swift & Co.*, 323 U. S. 134, 136-137.

⁵⁷ See statement of Senator Cooper, 1947 Cong. Rec. 2374.

⁵⁸ Remarks of Representative Walter, 1947 Cong. Rec. 4515. See also statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377.

⁵⁹ See statements of Senator Cooper, 1947 Cong. Rec. 2374-2377. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947.

⁶⁰ See statement of Senator Cooper, 1947 Cong. Rec. 2377.

⁶¹ Senate Report, p. 48; statements of Senator Cooper, 1947 Cong. Rec. 2375-2377.

⁶² As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (1947 Cong. Rec. 4513) and by Senator Wiley in the Senate (1947 Cong. Rec. 4501), the language of the provision here involved follows that of the Senate bill.

(1) In connection with the operation of a lathe an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.⁶³

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.⁶⁴ If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,⁶⁵ changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.⁶⁶ On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.⁶⁶ However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.⁶⁷

SECTION 790.9. "COMPENSABLE BY AN EXPRESS PROVISION OF A WRITTEN OR NONWRITTEN CONTRACT."

(a) Where an employee engages in a "preliminary" or "postliminary" activity of the kind described in section 4 (a) of the Portal Act and this activity is "compensable by an express provision of a written or nonwritten contract" applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,⁶⁸ and does not relieve the employer of any obligation he would otherwise have

⁶³ Statement of Senator Cooper, 1947 Cong. Rec. 2375; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 1947 Cong. Rec. 2375, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 693.

⁶⁴ See statements of Senator Cooper, 1947 Cong. Rec. 2375, 2377; colloquy between Senators Barkley and Cooper, 1947 Cong. Rec. 2428.

⁶⁵ Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

⁶⁶ See colloquy between Senators Cooper and McGrath, 1947 Cong. Rec. 2375.

⁶⁷ See Senate Report, p. 47; statements of Senator Donnell, 1947 Cong. Rec. 2383, 2440; statements of Senator Cooper, 1947 Cong. Rec. 2374, 2375.

⁶⁸ See sec. 790.4 of this bulletin.

under that Act to include time spent in such activity in computing hours worked.⁶⁹

(b) The word "compensable" is used in subsections (b), (c), and (d) of section 4 without qualification.⁷⁰ It is apparent from these provisions that "compensable," as used in the statute, means compensable in any amount.⁷¹

(c) The phrase "compensable by an express provision of a written or nonwritten contract" in section 4 (b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.⁷² The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words "compensable by an express provision" indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not "compensable by * * * a written or nonwritten contract" within the meaning of section 4 (b) of the Portal Act unless the contract making the activity compensable is one "between such employee,⁷³ his agent, or collective-bargaining representative and his employer."⁷³ Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by "contract" of an activity, for purposes of section 4.

SECTION 790.10. "COMPENSABLE * * * BY A CUSTOM OR PRACTICE"

(a) A "preliminary" or "postliminary" activity of the type described in section 4 (a) of the Portal Act may be "compensable," within the meaning of section 4 (b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,⁷⁴ and section 4 (d) does not operate to exclude the time spent in such activity from hours worked under the Fair Labor Standards Act.⁷⁵ Accordingly, in the event that no "express provision of a written or nonwritten contract" makes compensable the activity in question, it is necessary to determine whether the activity is made compensable by a

⁶⁹ See sec. 790.5 and 790.7 of this bulletin.

⁷⁰ The word is also so used throughout sec. 2 of the act, which relates to past claims. See secs. 790.23-790.25 of this bulletin.

⁷¹ Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947.

⁷² See colloquy between Senators Donnell and Lodge, 1947 Cong. Rec. 2252; colloquies between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253, 2256.

⁷³ The terms "employee" and "employer" have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, sec. 13 (a).

⁷⁴ See sec. 790.4 of this bulletin.

⁷⁵ See secs. 790.5 and 790.7 of this bulletin.

custom or practice, not inconsistent with such a contract, in effect at the establishment or other place where the employee was employed.⁷⁶

(b) The meaning of the word "compensable" is the same, for purposes of the statute, whether a contract or a custom or practice is involved.⁷⁷

(c) The phrase, "custom or practice," is one which in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the congressional intent, with such aid as may be had from the many judicial decisions interpreting the words "custom" and "practice" as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the congressional reference to contract, custom or practice was a deliberate use of nontechnical words which are commonly understood and broad enough to cover every normal situation under which an employee works for an employer for compensation.⁷⁸ Accordingly, "custom" and "practice," as used in section 4 (b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only "to protect every collective bargaining agreement about these activities" but "to protect the agreement between one workman and his employer" and "every practice or custom which we assume must have entered into the minds of the people when they made the contract."⁷⁹

(d) The words, "custom or practice," as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase "in effect * * * at the establishment or other place where such employee was employed." The compensability of an activity under custom or practice, for purposes of this act, is tested by the custom or the practice at the "particular place of business," "plant," "mine," "factory," "forest," etc.⁸⁰

(e) "The custom or practice" by which compensability of an activity is tested under the statute is one "covering such activity." Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant

⁷⁶ See Senate Report, p. 49.

The same is true with respect to the activities referred to in sec. 2 of the Portal Act in an action or proceeding relating to activities performed before May 14, 1947. See Senate Report, p. 45. See also sec. 790.23 of this bulletin.

⁷⁷ See sec. 790.9 (b) of this bulletin.

⁷⁸ See colloquy between Senators Donnell and Tydings, 1947 Cong. Rec. 2196, 2197; colloquy between Senators Donnell, Lodge, and Hawkes, 1947 Cong. Rec. 2252, 2253; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2255, 2256. Statements of Senator Cooper, 1947 Cong. Rec. 2371.

⁷⁹ Statements of Representative Gwynne, 1947 Cong. Rec. 1623.

⁸⁰ Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

to the plant gate. It is enough, however, if there is a custom or practice covering "such activity"—there is no provision, as there is with regard to contracts, that the custom or practice be one "between such employee, his agent, or collective-bargaining representative, and his employer."⁸¹

(f) Another qualification of the "custom or practice" referred to in the statute is that it be "not inconsistent with a written or nonwritten contract" of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.⁸² However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.⁸³

SECTION 790.11. CONTRACT, CUSTOM, OF PRACTICE IN EFFECT "AT THE TIME OF SUCH ACTIVITY"

The "contract," "custom," or "practice" on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect "at the time of such activity." Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

SECTION 790.12. "PORTION OF THE DAY"

A "preliminary" or "postliminary" activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section "only when it is engaged in during the portion of the day with respect to which it is so made compensable."⁸⁴ This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;⁸⁵ the provision is applicable only to walking, riding, traveling or other "preliminary" or "postliminary" activities of the kind described in section 4 (a) of the Portal Act,⁸⁶ which are engaged in *outside* the workday, during the portions of the day *before* performance of the first principal activity and *after* performance of the last principal activity of the employee.⁸⁷

⁸¹ See sec. 790.9 (d) of this bulletin.

⁸² Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 1947 Cong. Rec. 2253.

⁸³ Senate Report, pp. 45, 49.

⁸⁴ Sec. 4 (c) of the Portal Act (set out in full in sec. 790.3 of this bulletin).

⁸⁵ See secs. 790.4-790.6 of this bulletin.

⁸⁶ Conference Report, pp. 12, 13.

⁸⁷ See Conference Report, p. 13; secs. 790.4 (c) and 790.5 (b) of this bulletin.

The scope of sec. 4 (c) is narrower in this respect than that of sec. 2 (b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also sec. 790.23 of this bulletin.

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

SECTION 790.13. GENERAL NATURE OF DEFENSE

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that "the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation" or "any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged." In order to provide a defense with respect to acts or omissions occurring *on or after* May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the "Administrator of the Wage and Hour Division of the Department of Labor," and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing.⁸⁸ But where the acts or omissions complained of occurred *before* May 14, 1947, the employer may show that they were in good faith in conformity with and in reliance on "any" (written or non-written) administrative regulation, order, ruling, or interpretation of "any agency of the United States," or any administrative practice or enforcement policy of "any such agency" with respect to the class of employers to which he belonged.⁸⁹ In all cases, however, the act or omission complained of must be both "in conformity with"⁹⁰ and "in reliance on"⁹¹ the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be "in good faith."⁹² The relief from liability or punishment provided by sections 9 and 10 of the Portal Act is limited by the statute to employers who both plead and prove all the requirements of the defense.⁹³

(b) The distinctions mentioned in paragraph (a), above, depending on whether the acts or omissions complained of occurred before or after May 14, 1947, may be illustrated as follows: Assume that an

⁸⁸ Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4514, 4515. See also secs. 790.17 and 790.19 of this bulletin.

⁸⁹ Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398; statements of Representatives Gwynne and Walter, 1947 Cong. Rec. 4514, 4515. See also sec. 790.19 of this bulletin.

⁹⁰ See sec. 790.14, below.

⁹¹ See sec. 790.16, below.

⁹² See sec. 790.15, below.

⁹³ Conference Report, pp. 15, 16; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4514, 4515; statements of Senators Cooper and Donnell, 1947 Cong. Rec. 4502, 4577, 4578. See also the President's message of May 14, 1947, to the Congress on approval of the Act.

The requirements of the statute as to pleading and proof emphasize the continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the protection which Congress intended it to afford employees. See sec. 790.2 of this bulletin: cf. statements of Senator Wiley, 1947 Cong. Rec. 4398; Senator Donnell, 1947 Cong. Rec. 4578, and Representative Walter, 1947 Cong. Rec. 4514, 4515.

employer, on commencing performance of a contract with X Federal agency extending from January 1, 1947, to January 1, 1948, received an opinion from the agency that employees working under the contract were not covered by the Fair Labor Standards Act. Assume further that the employer may be said to have relied in good faith upon this opinion, and therefore did not compensate such employees during the period of the contract in accordance with the provisions of the act. After completion of the contract on January 1, 1948, the employees, who have learned that they are probably covered by the act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon a written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947, to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

SECTION 790.14. "IN CONFORMITY WITH"

(a) The "good faith" defense is not available to an employer unless the acts or omissions complained of were "in conformity with" the regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy upon which he relied.⁹⁴ This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting "in conformity with" an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator of the Wage and Hour Division, stating that if certain specified circumstances and facts regarding the work performed by the employer's employees exist, the employees are, in his opinion, exempt from provisions of the Fair Labor Standards Act. One of these hypothetical circumstances upon which the opinion was based does not exist regarding these employees, but the employer, erroneously assuming that this circumstance is irrelevant, relies upon the Administrator's ruling and fails to compensate the employees in accordance with the act. Since he did not act "in conformity" with that opinion, he has no defense under section 9 or 10 of the Portal Act.

(c) As a further example of the requirement of conformity, reference is made to the illustration given in section 790.13 (b) above, where an employer, who had a contract with the X Federal agency covering the period from January 1, 1947, to January 1, 1948, received an opinion from the agency that employees working on the contract were not covered by the Fair Labor Standards Act. Assume (1) that

⁹⁴ Statement of Senator Cooper, 1947 Cong. Rec. 4577; message of the President to Congress on approval of the act, May 14, 1947.

the X agency's opinion was confined solely and exclusively to activities performed under the particular contract held by the employer with the agency and made no general statement regarding the status under the act of the employer's employees while performing other work; and (2) that the employer, erroneously believing the reasoning used in the agency's opinion also applied to other and different work performed by his employees, did not compensate them for such different work, relying upon that opinion. As previously pointed out, the opinion from the X agency, if relied on and conformed with in good faith by the employer, would form the basis of a "good faith" defense for the period prior to May 14, 1947, insofar as the work performed by the employees on this particular contract with that agency was concerned. The opinion would not, however, furnish the employer a defense regarding any other activities of a different nature performed by his employees, because it was not an opinion concerning such activities, and insofar as those activities are concerned, the employer could not act "in conformity" with it.

SECTION 790.15. "GOOD FAITH"

(a) One of the most important requirements of sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer's "good faith" is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that "good faith" also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances.⁹⁵ "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.⁹⁶

(b) Some situations illustrating the application of the principles stated in paragraph (a) may be mentioned. Assume that a ruling from the Administrator, stating positively that the Fair Labor Standards Act does not apply to certain employees, is received by an employer in response to a request which fully described the duties of the employees and the circumstances surrounding their employment. It is clear that the employer's employment of such employees in such duties and under such circumstances in reliance on the Administrator's ruling, without compensating them in accordance with the act, would be in good faith so long as the ruling remained unrevoked and the employer had no notice of any facts or circumstances which would lead a reasonably prudent man to make further inquiry as to whether the employees came within the act's provisions. Assume, however, that the Administrator's ruling was expressly based

⁹⁵ Colloquy between Representatives Reeves and Devitt, 1947 Cong. Rec. 1620; colloquy between Senators Ferguson and Donnell, 1947 Cong. Rec. 4578.

⁹⁶ See statement of Senator McGrath, 1947 Cong. Rec. 2320; statement of Representative Keating, 1947 Cong. Rec. 4517; statement of Representative Walter, 1947 Cong. Rec. 4515.

on certain court decisions holding that employees so engaged were not engaged in commerce or in the production of goods for commerce, and that the employer subsequently learned from his attorney that a higher court had reversed these decisions or had cast doubt on their correctness by holding employees similarly situated to be engaged in an occupation necessary to the production of goods for interstate commerce. Assume further that the employer, after learning of this, made no further inquiry but continued to pay the employees without regard to the requirements of the act in reliance on the Administrator's earlier ruling. In such a situation, if the employees later brought an action against the employer, the court might determine that they were entitled to the benefits of the act and might decide that the employer, after learning of the decision of the higher court, knew facts which would put a reasonably prudent man upon inquiry and therefore had not proved his good faith in relying upon the Administrator's ruling after receiving this advice.

(c) In order to illustrate further this test of "good faith," suppose that the X Federal agency published a general bulletin regarding manufacturing, which contained the erroneous statement that all foremen are exempt under the Fair Labor Standards Act as employed in a "bona fide executive * * * capacity." Suppose also that an employer, knowing that the Administrator of the Wage and Hour Division is charged with the duties of administering the Fair Labor Standards Act and of defining the phrase "bona fide executive * * * capacity" in that act, nevertheless relied upon the above bulletin without inquiring further and, in conformity with this advice, failed to compensate his nonexempt foremen in accordance with the overtime provisions of the Fair Labor Standards Act for work subject to that act, performed before May 14, 1947. If the employer had inquired of the Administrator or had consulted the Code of Federal Regulations, he would have found that his foremen were not exempt. In a subsequent action brought by employees under section 16 (b) of the Fair Labor Standards Act, the court may decide that the employer knew facts which ought to have put him as a reasonable man upon further inquiry, and, consequently, that he did not rely "in good faith" within the meaning of section 9, upon the bulletin published by the X agency.⁹⁷

(d) Insofar as the period prior to May 14, 1947, is concerned, the employer may have received an interpretation from an agency which conflicted with an interpretation of the Administrator of the Wage and Hour Division of which he was also aware. If the employer chose to rely upon the interpretation of the other agency, which interpretation worked to his advantage, considerable weight may well be given to the fact that the employer ignored the interpretation of the agency charged with the administration of the Fair Labor Standards Act and chose instead to rely upon the interpretation of an outside agency.⁹⁸

⁹⁷ See statement of Representative Gwynne, 1947 Cong. Rec. 1620, and colloquy between Senators Connally and Donnell, 1947 Cong. Rec. 4579.

⁹⁸ This view was expressed several times during the debates. See statements of Representative Keating, 1947 Cong. Rec. 1566 and 4517; colloquy between Representatives Keating and Devitt, 1947 Cong. Rec. 1569; statement of Representative Walter, 1947 Cong. Rec. 4514-15; statement of Representative MacKinnon, 1947 Cong. Rec. 4516; statement of Representative Gwynne, 1947 Cong. Rec. 1620; statement of Senator Cooper, 1947 Cong. Rec. 4577 and 4578; colloquy between Senators Connally and Donnell, 1947 Cong. Rec. 4579.

Under these circumstances "the question could properly be considered as to whether it was a good-faith reliance or whether the employer was simply choosing a course which was most favorable to him."⁹⁹ This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.¹

SECTION 790.16. "IN RELIANCE ON"

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation, order, ruling, approval, interpretation, enforcement policy, or practice, the employer must also prove that he actually relied upon it.²

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the Administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been "in reliance on" that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

SECTION 790.17. "ADMINISTRATIVE REGULATION, ORDER, RULING, APPROVAL, OR INTERPRETATION"

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no

⁹⁹ Statement of Senator Cooper, 1947 Cong. Rec. 4577. Representative Walter, a member of the Conference Committee, made the following explanatory statement to the House of Representatives (1947 Cong. Rec. 4515): "The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him." Representative Gwynne made a similar statement (1947 Cong. Rec. 1620).

¹ Statement of Senator Wiley explaining conference agreement to the Senate, 1947 Cong. Rec. 4398; statement of Representative Walter, 1947 Cong. Rec. 4515.

² In a colloquy between Senators Thye and Cooper (1947 Cong. Rec. 4577), Senator Cooper pointed out that the purpose of sec. 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act "grew out of reliance upon" the ruling of an agency. [Italics supplied.] See also statement of Representative Keating, 1947 Cong. Rec. 1566; colloquy between Representatives Keating and Devitt, 1947 Cong. Rec. 1569; cf. colloquy between Senators Donnell and Ball, 1947 Cong. Rec. 4502.

distinction being made in regard to their function under the "good faith" defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms "regulation" and "order" are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.³

(c) The term "interpretation" has been used to describe a statement "ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language."⁴ This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term "ruling" commonly refers to an interpretation made by an agency "as a consequence of individual requests for rulings upon particular questions."⁵ Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term "approval" includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority.⁶

(f) The terms "administrative regulation, order, ruling, approval, or interpretation" connote affirmative action on the part of an agency.⁷ A failure to act or a failure to reply to an inquiry on the part of an administrative agency is not a "regulation, order, ruling, approval, or interpretation" within the meaning of sections 9 and 10.⁸ Thus, suppose that an employer writes a letter to the Administrator of the Wage and Hour Division, setting forth the facts concerning his business. He goes on to state in his letter that he believes his employees are not covered by the Fair Labor Standards Act, and that unless he hears to the contrary from the Administrator, he will not pay them in accordance with its provisions. When the employer does not receive a reply to his letter within what he regards as a reasonable time, he assumes that the Administrator agrees with his (the employer's) interpretation of the act and he acts accordingly. The employer's reliance under such circumstances is not a reliance upon an admin-

³ See Final Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; secs. 2 (c), 2 (d), and 10 (e) of the Administrative Procedure Act, 5 U. S. C. A., sec. 1001.

⁴ Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st sess. (1941) p. 27.

⁵ Final Report of the Attorney General's Committee, p. 27. To the same effect is 1 Vom Baur, Federal Administrative Law (1942), p. 492.

⁶ See sec. 2 (e) of the Administrative Procedure Act, 5 U. S. C. A., sec. 1001.

⁷ See Final Report of Attorney General's Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference Report, p. 16; statements of Representative Walter, 1947 Cong. Rec. 4515; statements of Representative Gwynne, 1947 Cong. Rec. 1545; statements of Senator Donnell, 1947 Cong. Rec. 2259; President's message of May 14, 1947, on approval of the Portal-to-Portal Act.

⁸ That this is true on and after the effective date of the Act is clear from the requirement in section 10 that the regulation, order, ruling, approval, or interpretation relied on must be that of the Administrator *in writing*. As to sec. 9, the terms appear to have no different meaning.

istrative regulation, order, ruling, approval, or interpretation, within the meaning of sections 9 and 10.

(g) The affirmative action taken by the agency must be one which actually results in a "regulation, order, ruling, approval, or interpretation." If, for example, the agency declines to express an opinion as to the application of the law in a particular fact situation, the agency is refraining from interpreting the law rather than giving an interpretation.⁹

(h) An employer does not have a defense under these two sections unless the regulation, order, ruling, approval, or interpretation, upon which he relies, is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified, or determined by judicial authority to be invalid, it is no longer a "regulation, order, ruling, approval, or interpretation," and, consequently, an employer's subsequent reliance upon it offers him no defense under sections 9 and 10.¹⁰ On the other hand, the last sentence in section 9 and in section 10 expressly provides that where the employer's good faith reliance on a regulation, order, ruling, approval, or interpretation occurs before it is rescinded, modified, or determined by judicial authority to be invalid, his claim of a "good faith" defense for such earlier period is not defeated by the subsequent rescission or modification or by the subsequent determination of invalidity.

(i) To illustrate these principles, assume that the Administrator of the Wage and Hour Division, in reply to an inquiry received from a particular employer, sends him a letter, in which the opinion is expressed that employees performing a particular type of work are not covered by the Fair Labor Standards Act. The employer relied upon the Administrator's letter and did not pay his employees, who were engaged in such work, in accordance with the provisions of the Fair Labor Standards Act. Several months later the Administrator issues a general statement, published in the Federal Register and given general distribution, that recent court decisions have persuaded him that the class of employees referred to above are within the coverage of the Fair Labor Standards Act. Accordingly, the statement continues, the Administrator hereby rescinds all his previous interpretations and rulings to the contrary. The employer who had received the Administrator's letter, not learning of the Administrator's subsequent published statement rescinding his contrary interpretations, continued to rely upon the Administrator's letter after the effective date of the published statement. Under these circumstances, the employer would, from the date he received the Administrator's letter to the effective date of the published statement rescinding the position expressed in the letter, have a defense under section 9 or 10, assuming he relied upon and conformed with that letter in good faith. However, in spite of the fact that this employer did

⁹ See Final Report of Attorney General's Committee on Administrative Procedure, p. 33.

¹⁰ See House Report, p. 7, and statements of Representative Gwynne, 1947 Cong. Rec. 1545, 1546, 1620. It will be noted that the provisions of sec. 12 of the act, affording relief to employers who acted in conformity with the invalidated "area of production" regulations, would have been unnecessary if reliance could be placed on a regulation no longer in effect. See statement of Representative Gwynne, 1947 Cong. Rec. 4514, and cf. remarks of Senator McCarran, discussing the bill before sec. 12 was added by the conference committee, 1947 Cong. Rec. 2322, 2323.

not receive actual notice of the subsequent published statement, he has no defense for his reliance upon the letter during the period after the effective date of the public statement, because the letter, having then been rescinded, was no longer an "administrative * * * ruling * * * or interpretation" within the meaning of sections 9 and 10.¹¹

SECTION 790.18. "ADMINISTRATIVE PRACTICE OR ENFORCEMENT POLICY"

(a) The terms "administrative practice or enforcement policy" refer to courses of conduct or policies which an agency has determined to follow¹² in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations.¹³ Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public.¹⁴ Although they may be, and frequently are, based upon decisions or views which the agency has set forth in its regulations, orders, rulings, approvals, or interpretations, nevertheless administrative practices and enforcement policies differ from these forms of agency action in that such practices or policies are not limited to matters concerned with the meaning or legal effect of the statutes administered by the agency and may be based wholly or in part on other considerations.

(b) To illustrate this distinction, suppose the Administrator of the Wage and Hour Division issues a general statement indicating that in his opinion a certain class of employees come within a specified exemption from provisions of the Fair Labor Standards Act in any workweek when they do not engage in a substantial amount of nonexempt work. Such a statement is an "interpretation" within the meaning of sections 9 and 10 of the Portal Act. Assume that at the same time, the Administrator states that for purposes of enforcement, until further notice, such an employee will be considered as engaged in a substantial amount of nonexempt work in any workweek when he spends in excess of a specified percentage of his time in such nonexempt work. This latter type of statement announces an "administrative practice or enforcement policy" within the meaning of sections 9 and 10 of the Portal Act.

(c) An administrative practice or enforcement policy may, under certain circumstances, be at variance with the agency's current inter-

¹¹ See statement of Representative Gwynne, 1947 Cong. Rec. 1620; colloquy between Representative Gwynne and Lee Pressman, Hearings before House Subcommittee on the Judiciary, pp. 156-157.

The fact that an employer has no defense under sec. 9 or 10 of the Portal Act in the situation stated in the text would not, of course, preclude a court from finding that he acted in good faith having reasonable grounds to believe he was not in violation of the law. In such event, sec. 11 of the act would permit the court to reduce or eliminate the employer's liability for liquidated damages in an employee suit. See sec. 790.22 of this bulletin.

¹² The agency may have determined to follow the course of conduct or policy for a limited time only (see pars. (c) and (f), this section) or for an indefinite time (see par. (b), this section), or for a period terminable by the happening of some contingency, such as a final decision in pending litigation.

¹³ See *United States v. Minnesota*, 270 U. S. 181 (1926); *United States v. Boston & Maine R. R. Co.*, 279 U. S. 732 (1929); *Lucas v. American Code Co.*, 280 U. S. 445 (1930); *Estate of Sanford v. Commissioners of Internal Revenue*, 308 U. S. 39 (1939). See also Final Report of Attorney General's Committee on Administrative Procedure in Government Agencies, pp. 26-29; 1 Vom Baur, *Federal Administrative Law* (1942), p. 474.

As to requirement that practice or policy be one with respect to a "class of employers," see par. (g) of this section.

¹⁴ Pursuant to sec. 3 of the Administrative Procedure Act, statements of general policy formulated and adopted by the agency for the guidance of the public are published in the Federal Register. An example is the statement of the Secretary of Labor and the Administrator of the Wage and Hour Division, dated June 16, 1947, published in 12 F. R. 3915.

pretation of the law. For example, suppose the Administrator announces that as a result of court decisions he has changed his view as to coverage of a certain class of employees under the Fair Labor Standards Act. However, he may at the same time announce that in order to give affected employers an opportunity to make the adjustments necessary for compliance with the changed interpretation, the Wage and Hour Division will not commence to enforce the act on the basis of the new interpretation until the expiration of a specified period.

(d) In the statement of the managers on the part of the House, accompanying the report of the conference committee on the Portal-to-Portal Act, it is indicated (p. 16) that under sections 9 and 10 "*an employer will be relieved from liability, in an action by an employee, because of reliance in good faith on an administrative practice or enforcement policy only (1) where such practice or policy was based on the ground that an act or omission was not a violation of the [Fair Labor Standards] Act, or (2) where a practice or policy of not enforcing the act with respect to acts or omissions led the employer to believe in good faith that such acts or omissions were not violations of the act.*" [Italics supplied.]

(e) The statement explaining the conference committee report goes on to say: "*However, the employer will be relieved from criminal proceedings or injunctions brought by the United States not only in the cases described in the preceding paragraph but also where the practice or policy was such as to lead him in good faith to believe that he would not be proceeded against by the United States.*" [Italics supplied.]

(f) The statement explaining the conference committee report gives the following illustration of the above rules:

An employer will not be relieved from liability under the Fair Labor Standards Act of 1938 to his employees (in an action by them) for the period December 26, 1946, to March 1, 1947, if he is not exempt under the "Area of Production" regulations published in the Federal Register of December 25, 1946, notwithstanding the press release issued by the Administrator of the Wage and Hour Division of the Department of Labor, in which he stated that he would not enforce the Fair Labor Standards Act of 1938 on account of acts or omissions occurring prior to March 1, 1947. On the other hand, he will, by reason of the enforcement policy set forth in such press release, have a good defense to a criminal proceeding or injunction brought by the United States based on an act or omission prior to March 1, 1947.

(g) It is to be noted that, under the language of sections 9 and 10, an employer has a defense for good faith reliance on an administrative practice or an enforcement policy only when such practice or policy is "with respect to the class of employers to which he belonged."¹⁵ Thus where an enforcement policy has been announced pertaining to laundries and linen-supply companies serving industrial or commercial establishments, the operator of an establishment furnishing window-washing service to industrial and commercial concerns, who relied upon that policy in regard to his employees, has no defense under sec-

¹⁵ This provision, which appeared for the first time in the conference bill, to which the term "practice" was restored after elimination by the Senate, was apparently designed to meet some of the objections which led to elimination of the word "practice" from the bill reported by the Senate Judiciary Committee. Cf. remarks of Senator Murray, 1947 Cong. Rec. 2313; remarks of Senator Johnston, 1947 Cong. Rec. 2451; colloquy between Senators Lucas and Donnell, 1947 Cong. Rec. 2259; remarks of Senator McGrath, 1947 Cong. Rec. 2330.

tions 9 and 10. The enforcement policy upon which he claimed reliance did not pertain to "the class of employers to which he belonged."

(h) Administrative practices and enforcement policies, similar to administrative regulations, orders, rulings, approvals, and interpretations, require affirmative action by an administrative agency.¹⁶ This should not be construed as meaning that an agency may not have administrative practices or policies to *refrain* from taking certain action, as well as practices or policies contemplating positive acts of some kind.¹⁷ But before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.¹⁸ Suppose, for example, that shoe factories in a particular area were not investigated by Wage and Hour Division inspectors operating in the area. This fact would not establish the existence of a practice or policy of the Administrator to treat the employees of such establishments, for enforcement purposes, as not subject to the provisions of the Fair Labor Standards Act, in the absence of proof of some affirmative action by the Administrator adopting such a practice or policy. A failure to inspect might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area.

(i) It was pointed out above that sections 9 and 10 do not offer a defense to the employer who relies upon a regulation, order, ruling, approval or interpretation which at the time of his reliance has been rescinded, modified, or determined by judicial authority to be invalid. The same is true regarding administrative practices and enforcement policies.¹⁹ However, a plea of a "good faith" defense is not defeated by the fact that after the employer's reliance, the practice or policy is rescinded, modified, or declared invalid.

SECTION 790.19. "AGENCY OF THE UNITED STATES"

(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy relied upon and conformed with must be that of an "agency of the United States." Insofar as acts or omissions occurring on or after May 14, 1947, are concerned, it must be that of the "agency of the United States specified in" section 10 (b), which, in the case of the Fair Labor Standards Act, is "the Administrator of the Wage and Hour Division of the Depart-

¹⁶ See *Union Stockyards & Transit Co. v. United States*, 308 U. S. 213, 223 (1939); and *United States v. American Union Transport, Inc.*, 327 U. S. 437, 454 (1946). Cf. *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349, 351 (1941). See also President's message of May 14, 1947.

¹⁷ See, for example, *Mintz v. Baldwin*, 289 U. S. 346 (1933); where the Department of Agriculture announced "its policy for the present is to leave the control [of Bang's disease] with the various States." See also in this connection the statement of June 23, 1947, by the Senate Committee on the Judiciary regarding the President's message of May 14, 1947, on the Portal-to-Portal Act, 1947 Cong. Rec. 7694.

¹⁸ *Union Stockyards & Transit Co. v. United States*, *supra*. It may be noted in this connection that examples given by the sponsors of the legislation, in discussing the terms "administrative practice or enforcement policy," involved situations in which affirmative action had been taken by the agency. Conference Report, p. 16; 1947 Cong. Rec. 2259, 2272, 4515-16.

¹⁹ See sec. 790.17, pars. (h) and (i), and footnotes 12 and 13 above.

ment of Labor." However, with respect to acts or omissions occurring prior to May 14, 1947, section 9 of the act permits the employer to show that he relied upon and conformed with a regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy of "any agency of the United States."²⁰

(b) The Portal Act contains no comprehensive definition of "agency" as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the "agency" whose regulation, order, ruling, approval, interpretation, administrative practice, or enforcement policy may be relied on is confined to "the agency of the United States" specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved.²¹ Similarly, the definitions of "agency" in other Federal statutes²² indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment.²³ Furthermore, it appears from the statement of the managers on the part of the House, accompanying the Conference Committee Report, that the term "agency" as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with "*must be those of an 'agency' and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the [Fair Labor Standards] Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretation, unless it is in fact the interpretation of the agency.*"²⁴ Similarly, the chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the "good faith" defense: "It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling."²⁵

(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation,

²⁰ The differences in the provisions of the two sections are explained and illustrated in sec. 790.13 of this bulletin.

²¹ In regard to the Walsh-Healey Act, "agency" is defined in sec. 10 of the Portal-to-Portal Act as including, in addition to the Secretary of Labor, "any Federal officer utilized by him in the administration of such act." The legislative history of the Portal-to-Portal Act (1947 Cong. Rec. 2314-2315) reveals that this clause was added because of the language in the Walsh-Healey Act authorizing the Secretary of Labor to administer the act "and to utilize such Federal officers and employees * * * as he may find necessary in the administration."

²² Federal Register Act, 44 U. S. C., sec. 304; Federal Reports Act, 5 U. S. C., sec. 139; Administrative Procedure Act, 5 U. S. C., sec. 1001.

²³ See *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942); *United States v. Watashe*, 102 F. (2d) 428 (C. C. A. 10, 1939); 39 Opinions Attorney General 15 (1925). Cf. *Keyser v. Hitz*, 133 U. S. 138 (1890); 39 Opinions Attorney General 541 (1933); 13 George Washington Law Review 144 (1945).

²⁴ See also statement by Representative Gwynne, 1947 Cong. Rec. 1620; and statement by Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4398.

²⁵ Statement of Senator Wiley, 1947 Cong. Rec. 4398.

administrative practice, or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of a final nature as the official act or policy of the agency.²⁶ Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices, or enforcement policies of the agency within the meaning of sections 9 and 10.

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

SECTION 790.20. RIGHT OF EMPLOYEES TO SUE; RESTRICTIONS ON REPRESENTATIVE ACTIONS

Section 16 (b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (other than a member of the affected group) to maintain an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16 (b). With respect to these actions, the amendment provides that no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The amendment is expressly limited to actions which are commenced *on or after* the date of enactment of the Portal Act. Representative actions which were pending on May 14, 1947, are not affected by this amendment.²⁷ However, under sections 6 and 8 of the Portal Act, a collective or representative action commenced prior to such date will be barred as to an individual claimant who was not specifically named as a party plaintiff to the action on or before September 11, 1947, if his written consent to become such a party is not filed with the court within a prescribed period.²⁸

SECTION 790.21. TIME FOR BRINGING EMPLOYEE SUITS

(a) The Portal Act²⁹ provides a statute of limitations fixing the time limits within which actions by employees under section 16 (b) of the Fair Labor Standards Act³⁰ may be commenced, as follows:

²⁶ Statement by Representative Gwynne, 1947 Cong. Rec. 1620; statements by Representative Walter, 1947 Cong. Rec. 1550, 4514-4515; statement by Representative Robsion, 1947 Cong. Rec. 1553-1554; statement by Senator Thye, 1947 Cong. Rec. 4578.

²⁷ Conference Report, p. 13.

²⁸ Conference Report, pp. 14, 15. The claimant must file this consent within the shorter of the following two periods: (1) 2 years, or (2) the period prescribed by the applicable State statute of limitations. See Conference Report, p. 15.

²⁹ See secs. 6-8, inclusive.

³⁰ Sponsors of the legislation stated that the time limitations prescribed therein apply only to the statutory actions, brought under the special authority contained in sec. 16 (b), in which liquidated damages may be recovered, and do not purport to affect the usual application of State statutes of limitation to other actions brought by employees to recover wages due them under contract, at common law, or under State statutes. Statements of Representative Gwynne, 1947 Cong. Rec. 1545, 1614; colloquy between Representatives Robsion and Celler, 1947 Cong. Rec. 1549.

(1) Actions to enforce causes of action accruing *on or after* May 14, 1947: 2 years.

(2) Actions to enforce causes of action accruing *before* May 14, 1947:³¹ 2 years, or period prescribed by applicable State statute of limitations, *whichever is shorter*.

These are maximum periods for bringing such actions, measured from the time the employee's cause of action *accrues* to the time his action is *commenced*.³²

(b) The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages "accrues" when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.³³ The Portal Act³⁴ provides that an action to enforce such a cause of action shall be considered to be "commenced":

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant,

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.³⁵

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the 2-year period of limitations may be suspended for any cause.³⁶ In this connection attention is directed to section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940,³⁷ as amended, which provides that the period of military service shall

³¹ This refers to actions commenced after September 11, 1947. Such actions commenced on or between May 14, 1947, and September 11, 1947, were left subject to State statutes of limitations. As to collective and representative actions commenced before May 14, 1947, sec. 8 of the Portal Act makes the period of limitations stated in the text applicable to the filing, by certain individual claimants, of written consents to become parties plaintiff. See Conference Report, p. 15; sec. 790.20 of this bulletin.

³² Conference Report, pp. 15-15.

³³ *Reid v. Solar Corp.*, 6 W. H. Cases 508; *Mid-Continent Petroleum Corp. v. Keen*, 157 F. (2d) 310, 316 (C. C. A. 8). See also *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697; *Rigopoulos v. Kervan*, 140 F. (2d) 506 (C. C. A. 2).

In some instances an employee may receive, as a part of his compensation, extra payments under incentive or bonus plans, based on factors which do not permit computation and payment of the sums due for a particular workweek or pay period until some time after the pay day for that period. In such cases it would seem that an employee's cause of action, insofar as it may be based on such payment, would not accrue until the time when such payment should be made. Cf. *Walling v. Harnischfeger Corp.*, 325 U. S. 427.

³⁴ Sec. 7. See also Conference Report, p. 14.

³⁵ This is also the rule under sec. 8 of the Portal Act as to individual claimants, in collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

³⁶ A limited suspension provision was contained in sec. 2 (d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report indicate the reason for this. While the courts have held that in a proper case a statute of limitations may be suspended by causes not mentioned in the statute itself (*Braun v. Sauerwein*, 10 Wall. 218, 223. See also *Richards v. Maryland Ins. Co.*, 8 Cranch 84, 92; *Bauserman v. Blunt*, 147 U. S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim. *Bauserman v. Blunt*, 147 U. S. 647, 657; *Smith v. Continental Oil Co.*, 59 F. Supp. 91, 94.

³⁷ Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U. S. C. A. App. sec. 525).

not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

SECTION 790.22. DISCRETION OF COURT AS TO ASSESSMENT OF LIQUIDATED DAMAGES

(a) Section 11 of the Portal Act provides that in any action brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16 (b) of the Fair Labor Standards Act.³⁸

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employer must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16 (b) of the Fair Labor Standards Act, regardless of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.³⁹

(c) What constitutes good faith on the part of an employer, and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests.⁴⁰ Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.

(d) Section 11 of the Portal Act does not change the provisions of section 16 (b) of the Fair Labor Standards Act under which attor-

³⁸ Sec. 16 (b) of the Fair Labor Standards Act provides that an employer who violates the minimum-wage or overtime provisions of the act shall be liable to the affected employees not only for the amount of the unpaid minimum wages or unpaid overtime compensation, as the case may be, but also for an additional equal amount as liquidated damages. The courts have held that this provision is "not penal in its nature" but rather that such damages "constitute compensation for the retention of a workmen's pay" where the required wages are not paid "on time." Under this provision of the law, the courts have held that the liability of an employer for liquidated damages in an amount equal to his underpayments of required wages becomes fixed at the time he fails to pay such wages when due and the courts were given no discretion, prior to the enactment of the Portal-to-Portal Act, to relieve him of any portion of this liability. See *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697; *Overnight Motor Transp. Co. v. Missel*, 316 U. S. 572.

³⁹ See Conference Report, p. 17; remarks of Representative Walter, 1947 Cong. Rec. 1550; President's message of May 14, 1947, to the Congress on approval of the Portal Act.

⁴⁰ Cf. secs. 790.13-790.16 of this bulletin.

ney's fees and court costs are recoverable when judgment is awarded to the plaintiff.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES BEFORE MAY 14, 1947

SECTION 790.23. LIABILITY OF EMPLOYER; EFFECT OF CONTRACT, CUSTOM, OR PRACTICE

(a) Section 2 of the Portal Act, which relates to activities engaged in by employees prior to the effective date of the act, was designed to meet the problem which Congress found had arisen as a result of existing "portal-to-portal" claims.⁴¹ Subsections (a) and (b) of this section provide as follows:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purpose of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

It will be noted that the above language contains certain words and phrases which are similarly used in section 4 of the act, relating to future claims. Reference is made to the discussion of that section for comments as to the meaning and effect of such terms.⁴² The discussion of these provisions which follows is confined to certain general comments.

(b) Like section 4 of the act, previously discussed, section 2 affords relief to employers from liability or punishment to which they might otherwise be subject because they did not pay their employees in accordance with the Fair Labor Standards Act for or on account of certain activities which were, at the time of performance, *not* compensable either by contract or by a custom or practice as described in the statute. A major difference is that section 2 refers only to activities performed *before* May 14, 1947 (the effective date of the act) while section 4 is concerned only with activities performed *on or after that date*. Although the same criteria of contract, custom, and prac-

⁴¹ See Portal Act, sec. 1; Conference Report, pp. 9, 10; House Report, pp. 1-6; Senate Report, pp. 1-45; statement of Representative Gwynne, 1947 Cong. Rec. 4513; statements of Senator Wiley, 1947 Cong. Rec. 2151-2156, 4397; statements of Senator Donnell, 1947 Cong. Rec. 2196, 2197.

⁴² See secs. 790.4, 790.9-790.12 of this bulletin.

tice are used to determine compensability,⁴³ the provisions of section 2 (a), (b) of the Portal Act differ from the corresponding provisions of section 4, relating to future claims, in that their scope is not confined to activities engaged in outside the workday proper, but extends to such activities engaged in at any time during the 24 hours of the day.⁴⁴ However, it is apparent from the statutory language and the legislative history that the quoted provisions were intended to carry out the policy expressed in section 1 of the act and were not intended to relieve an employer from liability or punishment for failing to pay compensation as required by the Fair Labor Standards Act for or on account of any activities of his employees which were compensable in any amount under a contract, custom, or practice of the kind described in subsection (a),⁴⁵ even though such activities were so-called "portal-to-portal" activities.⁴⁶

(c) It will be noted that the relief afforded employers by the provisions quoted in paragraph (a) above is relief from liability or punishment "in any action or proceeding."⁴⁷ Whether the relief thus provided is available to a particular employer in a given fact situation would, therefore, seem to be a matter for determination in such an action or proceeding on the basis of the proof made therein. The language "any action or proceeding" indicates that, with respect to activities performed before May 14, 1947, these provisions apply in accordance with their terms in any action or proceeding to enforce liability or impose punishment on the employer, whether commenced before or on or after such date.⁴⁸

SECTION 790.24. EFFECT OF PORTAL ACT ON DETERMINATION OF HOURS WORKED PRIOR TO MAY 14, 1947

(a) Section 2 (c) of the Portal Act provides as follows:

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted *all* that time, but *only* that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section. [*Italics supplied.*]⁴⁹

This provision relates to the determination of hours worked prior to May 14, 1947. The effect of the Portal Act on the determination of hours worked under the Fair Labor Standards Act after that date is discussed at another point in this bulletin.⁵⁰ Under the terms of the quoted provision, time spent by employees prior to the enactment of the latter act in activities which were not compensable by contract, custom, or practice within the meaning of the Portal Act is to be ex-

⁴³ See secs. 790.5 (b), 790.10-790.14 above.

⁴⁴ See statements of Senator Donnell, 1947 Cong. Rec. 2196, 2255, 2440.

⁴⁵ See Conference Report, pp. 9, 10; 1947 Cong. Rec. 1621, 1623, 1629, 2194, 2196, 2197, 2200, 2203, 2252, 2253, 2370, 2371, 2373, 2378, 2383, 2384. See also the President's message on approval of the Portal-to-Portal Act, May 14, 1947.

⁴⁶ See colloquy between Senators Tydings and Donnell, 1947 Cong. Rec. 2196; colloquy between Senators Lodge, Donnell, and Hawkes, 1947 Cong. Rec. 2252, 2253.

⁴⁷ The quoted language does not appear in the corresponding provisions of sec. 4, relating to future claims. See sec. 790.4 of this bulletin.

⁴⁸ See Conference Report, p. 9.

⁴⁹ Subsecs. (a) and (b) are discussed in sec. 790.23 of this bulletin.

⁵⁰ See secs. 790.5-790.8 of this bulletin.

cluded in computing worktime for purposes of determining whether the minimum wage and overtime requirements of the Fair Labor Standards Act were met.⁵¹ On the other hand, time that constituted hours worked, which was devoted to activities which *were* so compensable, is not removed by these provisions from the category of time worked, for purposes of the Fair Labor Standards Act; the statute expressly provides that *all* such time shall be counted in computing hours worked.⁵²

(b) In determining time worked prior to May 14, 1947, in accordance with the provision quoted in paragraph (a) above, regard must be had to the "portion of the day" provisions of section 2 (b) of the Portal-to-Portal Act as well as the more general provisions of section 2 (a).⁵³

SECTION 790.25. JURISDICTION OF COURTS LIMITED AS TO WAGE CLAIMS FOR PERIODS PRIOR TO MAY 14, 1947

(a) Section 2 (d) of the Portal Act provides that:

No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.⁵⁴

(b) It will be noted that this provision of the act limits the jurisdiction of both Federal and State courts in all such actions or proceedings whether commenced before or after the enactment of the act. It is important to bear in mind that this provision does *not* affect the jurisdiction of any court in any action or proceeding insofar as it is based on failure to pay minimum wages or overtime compensation for any activities engaged in by employees *on or after* May 14, 1947. This limitation of jurisdiction affects only those actions or proceedings in which it is sought to enforce liability or impose punishment on an employer for, or on account of, his failure to pay, the required minimum wages or overtime compensation for activities engaged in by employees during periods *prior to May 14, 1947*, and then only to the extent that such activities were not compensable by contract, custom, or practice as provided in subsections 2 (a) and 2 (b) of the Portal Act.⁵⁵

⁵¹ This aspect of the quoted provision is, as explained in the Conference Report, intended to make clear, as was done in sec. 2 of the Senate amendment to the bill (H. R. 2157) as passed by the House of Representatives (not contained in the bill as finally enacted), that no judicial or administrative interpretation will have the effect of including as worktime other time which was not made compensable by contract, custom, or practice. Conference Report, p. 10.

⁵² The purpose of this portion of the quoted provision, as explained by the Conference Committee, is to emphasize that employers are not relieved from liability for the payment of minimum wages and overtime compensation for any time during which the employee engaged in activities compensable under contract, custom, or practice as provided in the statute. Sec. 3 of the Senate amendment, which so provided, was omitted under the conference agreement as surplusage, and as fully covered by sec. 2 (c) of the bill as agreed to in conference. Conference Report, p. 10.

⁵³ These provisions are quoted in sec. 790.23 above. See also Conference Report, p. 10, and cf. sec. 790.12 of this bulletin.

⁵⁴ The text of subsecs. (a) and (b) appears above in sec. 790.23 (a) of this bulletin.

⁵⁵ See in this connection, secs. 790.23 and 790.24 of this bulletin.

The denial of jurisdiction is "not applicable to actions or proceedings in which judgment has become final prior to the date of the enactment" of the act.⁵⁶

(c) It appears from the language quoted above that the jurisdiction of the courts with respect to an action or proceeding remains unaffected by this provision to the extent that such an action or proceeding seeks to impose liability or punishment either (1) for failure to pay wages in accordance with the Fair Labor Standards Act for or on account of activities which were compensable by contract, custom, or practice as provided in sections 2 (a), (b) of the Portal Act, or (2) for child labor or other violations of the Fair Labor Standards Act where no liability or punishment is sought to be imposed "for or on account of the failure of the employer to pay minimum wages or overtime compensation."

SECTION 790.26. PROHIBITION OF ASSIGNMENTS

Assignees of employees' causes of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act have, in the past, been allowed to recover in some cases where such assignments are permitted by local law, on the theory that the act does not expressly or by implication forbid such assignments and that they do not contravene public policy.⁵⁷ Certain such assignments are now prohibited by section 2 (e) of the Portal Act.⁵⁸ This section expressly refers only to causes of action which accrued ⁵⁹ prior to May 14, 1947, and applies only "to the extent that" such a cause of action "is based on an activity which was not compensable" under contract, custom, or practice within the meaning of the provisions of section 2 (a) and 2 (b) of this act.⁶⁰ To the extent that such a cause of action is based on such an activity, section 2 (e) provides that neither it nor "any interest in" it "shall hereafter be assignable, in whole or in part." As explained in the Conference Report,⁶¹ this provision will render it impossible for anyone (even though permitted to do so under State law) to buy up existing claims which were not compensable under contract, custom, or practice, with the hope of compromising such claims at a profit under the provisions of section 3 of the act.⁶²

SECTION 790.27. COMPROMISE OF CLAIMS EXISTING PRIOR TO MAY 14, 1947

(a) Section 3 of the Portal Act authorizes compromises of certain claims on causes of action under the Fair Labor Standards Act which accrued before enactment of the Portal Act, as follows:

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, * * * which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compro-

⁵⁶ Conference Report, p. 11.

⁵⁷ *Steiner v. Pleasantville Constructors, Inc.*, 9 Labor Cas. (C. C. H.), par. 66,902. Cf. *Titus v. Wallick*, 306 U. S. 282.

⁵⁸ Cf. sec. 5 of the act, discussed in sec. 790.20 of this bulletin.

⁵⁹ As to meaning of "accrued," see the discussion in sec. 790.21 (b) of this bulletin.

⁶⁰ These provisions are discussed in sec. 790.23 of this bulletin.

⁶¹ Conference Report, p. 11.

⁶² See the discussion of sec. 3 in sec. 790.27 of this bulletin.

mised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

* * * * *

(c) Any such compromise * * *, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise * * * heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release".

The foregoing provisions authorize compromise *only* of those causes of action accruing prior to May 14, 1947, and of actions thereon; the statute does not change existing law as to compromise of such claims,⁶³ with respect to any cause of action accruing⁶⁴ after the date of enactment of the act.⁶⁵ Subject to the conditions discussed below in paragraph (b), this statutory authorization of compromises extends to the following:

(1) All or any part of any cause of action accruing prior to May 14, 1947.

(2) All or any part of any action to enforce cause of action included in (1), above, whether such action was instituted before, on, or after May 14, 1947.

(3) Any compromise made prior to May 14, 1947, which comes within the terms of section 3 of the Portal-to-Portal Act.

(b) The compromise of existing claims just described is permitted, if, and only if, *all* of the following conditions are fulfilled in each case:

(1) Existence of a bona fide dispute as to the amount payable by an employer to employee.

(2) Absence of fraud and duress.

(3) The compromise sum for straight-time hours worked must be based on an hourly wage rate not less than the minimum rate per hour prescribed by the Fair Labor Standards Act or by a wage order issued thereunder, which is at present 40 cents (except in certain industries in Puerto Rico and the Virgin Islands).

(4) The compromise sum for overtime hours worked must be based on a rate not less than one and one-half times the minimum hourly wage rate prescribed by the Fair Labor Standards Act or by a wage order issued thereunder, which at the present means at least 1½ by 40, or 60 cents for each overtime hour (except in certain industries in Puerto Rico and the Virgin Islands).

(c) As pointed out in paragraph (b) (4) of this section, the sums paid in compromise of overtime claims may be based, as a minimum,

⁶³ Prior to the Portal Act, it was settled that claims of employees for minimum and overtime wages under the Fair Labor Standards Act could not be compromised because of disputes as to coverage of the act. *Schulte Co. v. Gangi*, 328 U. S. 108.

⁶⁴ For the meaning of "accruing" see sec. 790.21 (b) of this bulletin. The legislative history indicates that the omission of a provision for compromises or settlement of claims arising after enactment of the statute constitutes a recognition by the Congress of the danger, emphasized by the Supreme Court, that such a provision would lead to a breakdown of the labor standards established in the Fair Labor Standards Act. See Senator Donnell's statement, 1947 Cong. Rec. 2192.

⁶⁵ Conference Report, p. 12.

one one and one-half times the 40-cent minimum hourly wage. Thus, an employee whose regular hourly rate is 50 cents and who, accordingly, has a right to overtime at 75 cents per hour may compromise an existing claim, as authorized by section 3, for 60 cents an overtime hour, but not for less.⁶⁶ Permitting compromises of certain existing claims as specified does not, of course, alter the general requirement of section 7 of the Fair Labor Standards Act that overtime compensation under the act must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually employed.

(d) A "bona fide dispute" which must exist before any compromise can be made, would seem to mean an honest disagreement between employer and employee. It follows that no compromise would be permitted where there is no actual dispute as to the facts or the applicable law, or where the exact amount of an employer's liability under the law is clear. The Portal Act does not permit an employee to merely release his undisputed right to straight-time or overtime wage payments.⁶⁷

SECTION 790.28. WAIVER OF RIGHT TO LIQUIDATED DAMAGES

(a) The general rule that an employee whose employer has failed to pay him the minimum or overtime wages required by the Fair Labor Standards Act is not permitted to waive his right under section 16 (b) of the Act to liquidated damages for withholding the compensation due,⁶⁸ is modified by section 3 (b), (c), (d) of the Portal Act. Under these provisions, an employee may waive, in whole or in part, his right to liquidated damages *with respect to activities performed before May 14, 1947*. This permission is extended retrospectively to waivers of liquidated damages made by employees prior to May 14, 1947. Such waivers are made valid unless their invalidity was determined prior to that date by a final court judgment. It is provided that, *in the absence of fraud or duress* and according to the terms of the waiver, any waiver authorized by section 3 shall be a complete satisfaction of the employee's cause of action for the liquidated damages so waived and a complete bar to any action based on such cause of action.

(b) The general rule stated in paragraph (a) remains in effect in all situations where the liquidated damages are based on underpayments for activities performed *on or after May 14, 1947*. The Portal Act does not authorize the waiver by an employee of his right to such liquidated damages.⁶⁹

(c) It should be noted that an employee is not permitted to waive his right to the statutory minimum wages or to overtime payments at

⁶⁶ See Conference Report, p. 11; statement of Senator Wiley explaining the conference agreement to the Senate, 1947 Cong. Rec. 4397; statement of Representative Gwynne, 1947 Cong. Rec. 4513.

⁶⁷ Representative Walter, explaining the conference agreement to the House of Representatives, 1947 Cong. Rec. 4515, indicated that the phrase, "dispute as to the amount payable," would include disagreements as to matters of law such as whether employee's work is covered by the Fair Labor Standards Act or whether the employer is exempt, as well as disagreements as to matters of fact such as the number of hours worked or the wage rates paid.

⁶⁸ See *O'Neil v. Brooklyn Savings Bank*, 324 U. S. 697.

⁶⁹ See conference Report, p. 12. As to discretion of courts in awarding liquidated damages in such a case, see sec. 790.22 of this bulletin.

one and one-half times his regular hourly rate.⁷⁰ For example, an employee covered by the Fair Labor Standards Act who had been paid only 30 cents per hour for work performed in 1947 to May 14, and who did not work more than 40 hours in any workweek, has a valid claim for 10 cents for each hour worked plus liquidated damages in an equal amount.⁷¹ He is permitted to *waive* only his right to liquidated damages. Similarly, an employee who worked 48 hours a week prior to May 14, 1947 and was paid only 80 cents an hour has a valid claim for an additional 40 cents for each hour worked after 40 in the workweek, which he is not permitted to waive, although he may waive all or part of the equal amount to which he may be entitled as liquidated damages.

(d) No waiver by an employee of his right to recover attorney's fees and court costs in an action under section 16 (b) of the Fair Labor Standards Act is authorized by section 3.

SECTION 790.29. "AREA OF PRODUCTION" EXEMPTION PRIOR TO DECEMBER 26, 1946

(a) As explained in the conference report on the bill, section 12 of the Portal Act relieves employers from liability and punishment for failure to pay employees minimum wages or overtime compensation as prescribed in the Fair Labor Standards Act for or on account of any activity (within the scope of one of the "area of production" exemptions)⁷² engaged in by their employees prior to December 26, 1946,⁷³ if such employer can show that he—

(1) was relieved from such liability or punishment by reason of a valid definition of "area of production" by the Administrator applicable at the time of the performance of the activity, or (2) would have been so relieved by reason of an invalid definition applicable at the time of the performance if such definition had been valid, or (3) would have been so relieved if the definition finally made by the Administrator on December 18, 1946, and published in the Federal Register on December 25, 1946, had been in force on and after the effective date of the sections of such act of 1938 providing for minimum wages and overtime compensation.⁷⁴

The conference report points out also that the protection to the employer under the foregoing provisions for acts or omissions up to December 26, 1946, will exist even though hereafter the regulation of December 1946 is held invalid.

(b) It should be noted, however, that the provisions of section 12 do not relieve employers from liability or punishment under the Fair Labor Standards Act for acts or omissions with respect to any of the following activities engaged in by their employees:

(1) Activities engaged in on and after December 26, 1946.⁷⁵

⁷⁰ As to compromise of such claims arising out of activities performed before May 14, 1947, see sec. 790.27 of this bulletin.

⁷¹ The recovery of this amount as liquidated damages is made subject to the sound discretion of the courts under certain conditions. See the discussion of sec. 11 of the Portal Act in sec. 790.22 of this bulletin.

⁷² These exemptions are contained in secs. 7 (c) and 13 (a) (10) of the Fair Labor Standards Act.

⁷³ See *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607.

⁷⁴ Conference Report, p. 17.

⁷⁵ As to activities performed on or after December 26, 1946, and prior to March 1, 1947, see sec. 790.18(f) of this bulletin.

(2) Activities engaged in during the period from October 24, 1938, through December 25, 1946, by employees who were not employed within the "area of production" as defined in either (i) any regulation of the Administrator (valid or invalid) which was applicable at the time they were performed, or (ii) the currently effective regulation issued December 25, 1946.⁷⁶

(3) Activities other than those for which section 13 (a) (10) or the relevant portion of section 7 (c) provides an exemption, even though performed by employees employed within the "area of production" as defined in such a regulation.⁷⁷

All these latter activities remain subject to the applicable provisions of the Fair Labor Standards Act of 1938, as amended, and to current and subsequent regulations of the Administrator, to the same extent as they would have been had section 12 of the Portal-to-Portal Act not been enacted. Other sections of the Portal-to-Portal Act may, of course, be applicable in appropriate situations.

⁷⁶ Pt. 536 of Title 29, Ch. V, of the Code of Federal Regulations.

⁷⁷ See the Interpretative Bulletin (No. 14) on exemptions applicable to agriculture and operations on products of agriculture, which will be issued in revised form as pt. 780, subpt. A, of Title 29, Ch. V, of the Code of Federal Regulations.

